SUPREME COURT, U. S.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, [redacted] 1969

No. [redacted]

45

CLARENCE DEBACKER,

Appellant,

v.

HOMER BRAINARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL TO THE SUPREME COURT OF NEBRASKA

BRIEF FOR APPELLANT

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 662

CLARENCE DEBACKER,

Appellant,

v.

HOWARD BRAUSARD, Sheriff of Dodge County, Nebraska,

Appellee.

APPEAL FROM THE SUPREME COURT OF NEBRASKA

BRIEF FOR APPELLANT

Opinion Below

The opinion of the Supreme Court of Nebraska appears at Appendix 23. It is reported at 183 Neb. 461, 161 N.W. 2d 508.

The judgment of the Nebraska Supreme Court pursuant to its opinion appears at A. 32.

Jurisdiction

The judgment of the Nebraska Supreme Court was entered on October 4, 1968 and the notice of appeal was filed therein on October 7, 1968. The appeal was docketed in this Court on October 17, 1968, and probable jurisdiction was noted on February 24, 1969. The jurisdiction of this Court is invoked pursuant to 28 U.S.C., §1257 (2).

Constitutional Provisions and Statutes Involved

This appeal involves the Sixth and Fourteenth Amendments to the Constitution of the United States; the Nebraska juvenile court statutes, §43-201-220; and Sections 83-430 and 28-601(2), Revised Statutes of Nebraska 1943. Pertinent provisions are reprinted in Appendix A, *infra*.

Questions Presented

I

Whether provision of Nebraska Juvenile Court Act denying juvenile trial by jury in juvenile court for offense which would be triable by jury if committed by an adult, violates Sixth Amendment in light of *Application of Gault*, 387 U.S. 1; *Duncan v. Louisiana*, 391 U.S. 145; and *Bloom v. Illinois*, 391 U.S. 194.

II

Whether, in light of *Gault*, statute providing for proof by preponderance in delinquency proceeding, based on misconduct which would be felony if charged criminally, violates Fourteenth Amendment.

III.

Does Nebraska Juvenile Court Act, as construed by state supreme court, deny juvenile due process when prosecutor is vested with unreviewable discretion to proceed in juvenile court, or under the criminal code, thereby giving prosecutor sole power to determine whether juvenile shall have right to jury trial and whether prosecution's burden of proof is by preponderance or beyond a reasonable doubt.

Statement of the Case

DeBacker, a seventeen year old boy, gave a $30.00 check bearing the signature "Donald J. DeBacker," his father, to the O. P. Skaggs store for groceries on January 26, 1968 (A. 24). He told the clerk, who knew his father and mother and who had taken checks from his father previously, that his father's signature was on the check (A. 24). The boy gave a statement to the police in which he stated that his mother was determined she was going to have a birthday party for him and needed more food (A. 24). His mother was very jittery and told him to sign his father's name to a check blank which he had given him, assuring him that it was all right for him to go ahead and write the check (A. 24). The boy did so, signing his father's name (A. 24). His mother went to the grocery store with him and he went in and got groceries and approximately $10.00 change (A. 24). It was stipulated that his father would testify that his wife could not write checks on his account; that he told the store the check was not signed by him; that his signature did not appear on the check; and that he told the police perhaps his wife and son may have had something to do with the check (A. 24).

proceedings. Since it was held in *Duncan* v. *Louisiana*, 391 U.S. 145, that "trial by jury in criminal cases is fundamental to the American scheme of justice" and since *Gault* made clear that a delinquency proceeding from which incarceration can result "is comparable in seriousness to a felony prosecution", it follows that, in such a proceeding, a state cannot deny a jury trial.

The debatable desire for informality and the expeditious application of rehabilitative techniques do not justify constitutional short-cuts in juvenile court. The hallmark of totalitarian government is the premise that Big Brother knows what is best for the citizen, young or old, and if he thinks a citizen needs rehabilitation, procedural safeguards which might interfere with its prompt application are an annoying interference with the smooth workings of the system and are thus dispensable for the common good.

The fact that juries, more often than judges, might tend to acquit juveniles, is no constitutional excuse for making juries unavailable. The fact that jurors occasionally exercise an informal pardoning power, by acquitting in the face of technical proof of guilt, is one of the reasons for the continued vitality of the jury system. A youth as well as an adult is entitled to the interposition of an American jury between him and his government.

II.

A civil standard of proof is not constitutionally permissible in a proceeding which can lead to confinement for years. Nebraska, along with all other American jurisdictions, requires proof beyond a reasonable doubt to sustain a criminal conviction. Nebraska even requires a stricter standard of proof than "preponderance of the evidence"

in certain civil actions, i.e., actions based on fraud, etc. A state's incarceration of a juvenile on a far less strict standard of proof than is applied to an adult denies a juvenile equal protection of the laws and due process.

It is time to stop playing with words when individual liberty is at stake. A case is either civil or criminal and any case in which an individual is subject to confinement because of his volitional conduct, as distinguished from conduct which is the product of mental disease or deficiency, or a status, such as dependency, alcoholism, or being the victim of disease or contagion, is a criminal case.

III.

Due process demands that the decision as to whether a juvenile is to go to juvenile court or criminal court be made by someone other than his prosecutor under standards amounting to more than whim or caprice. Nebraska's Juvenile Court Act, as construed by its highest court, leaves this critical decision to the prosecutor's unfettered and unreviewable discretion.

Due process cannot depend upon the whim of any state officer outside the judicial system. Even though a state may not be constitutionally required to provide a juvenile court system, once it elects to do so, due process requires that the juvenile and his counsel have some voice as to which court will best protect the juvenile's interest and serve his needs.

Other jurisdictions provide either statutory standards, or some sort of judicial screening, in an effort to minimize the arbitrary selection of the forum.

ARGUMENT

I.

A Juvenile Charged With Violation of a State Criminal Law as the Basis for an Adjudication of Delinquency Is Constitutionally Entitled to Trial by Jury in Juvenile Court if the Offense Is One Which Would Give Rise to a Constitutional Right to Trial by Jury if Committed by an Adult and Triable in an Adult Criminal Court.

"We live in a sea of semantic disorder * * *"[3] and in this century the constitutional rights of juveniles have been drowned in it. Insisting that incarceration of a child in an industrial school, not to punish him, but to furnish him "guardianship, maintenance, and care for his benefit and that of society is not an interference with personal liberty requiring a trial by jury to justify it,"[4] courts have solemnly held that the Constitution was not for juveniles since the state could prescribe incarceration for their welfare in the same manner as their parents. It was argued just as sincerely, over forty years ago, that child labor laws were unconstitutional because they interfered with the child's constitutional freedom to contract to work in a coal mine or a sweat shop. Proponents of the "civil" philosophy are arguing, in essence, that a sandbur will become an orchid, if we label it so often enough and sincerely enough, because, after all, we will all be better off with orchids.

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[3] Pres. Eisenhower, State of the Union message, Jan. 1960.

[4] *Laurie* v. *State*, 108 Neb. 239, 188 N.W. 110, quoting *Wisconsin Industrial School for Girls* v. *Clark County*, 103 Wis. 651, 79 N.W. 422.

Juveniles, as well as adults, had been entitled to jury trials[5] and the first juvenile court act even provided for jury trials.[6] Nebraska was no exception. As pointed out by the majority here:

> "At its inception in 1905, and until 1963, the Nebraska Juvenile Court Act, with respect to jury trials in juvenile court, provided: 'In all trials under this act where a delinquent child is charged with crime, any person interested therein may demand a jury or the judge of (on) his own motion may order a jury to try the case; * * *.' See Laws 1905, c. 59, s. 2, p. 306, now s. 43-202, R.R.S. 1943.
>
> This specific provision for a jury trial was effectively eliminated by this court. We held that charging a child with being delinquent did not charge him with a crime, even though the facts alleged would have constituted a specific charge of crime if made against an adult. Such charges, we said, merely set forth the necessary facts showing him to be delinquent. See Laurie v. State, 108 Neb. 239, 188 N.W. 110" (A. 26).

State ex rel. Weiner v. *Hans,* 174 Neb. 612, 119 N.W. 2d 72 (1963) was the last case, prior to this one, in which the Nebraska Supreme Court was faced with a juvenile's de-

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[5] *Ex parte Becknell,* 119 Cal. 496, 51 P. 692 (1897), contra, *Ex parte Ah Peen,* 51 Cal. 280 (1876); *People* v. *Turner,* 55 Ill. 280, 8 Am. Rep. 645 (1870); *State* v. *Ray,* 63 N.H. 406, 56 Am. Rep. 529 (1885); *Matter of Daniecki,* 117 N.J. Eq. 527, 177 A. 91 (1935). See also Antieau, Constitutional Rights in Juvenile Courts, 46 Cornell L. Q. 387, 400-401 (1961); Fortas, Equal Rights—For Whom, 42 N.Y.U. L. Rev. 401, 405 (1967).

[6] "(I)n all trials under this act any person interested therein may demand a jury of six, or the judge of his own motion may order a jury of the same number, to try the case." Laws of Ill. §2 (1899), cited in S. Glueck & E. Glueck, One Thousand Juvenile Delinquents 12 (1943).

mand for a jury trial. A jury trial was sought under the plain provisions of the 1905 Juvenile Court Act. The court adhered to its previous decisions and held the allegations constituting a crime had reference only to the charge of delinquency. In his last utterance as Chief Justice, Robert G. Simmons, C.J., succinctly dissented as follows:

> "I dissent from that part of the court's opinion that approves the denial of a jury trial. The rule adopted permits the prosecution to elect whether the accused shall have a jury trial or a trial by the court. The facts charged constitute a felony. By the device of charging that the accused is a delinquent and not a criminal, a jury trial is denied. The substance of the offense and not the form of the charge should control. The liberty and reputation of a person is involved. Youth as well as maturity are entitled to the benefits of the jury system. The statute and the Constitution so provide."

A juvenile now has no right to a jury trial in juvenile court in the great majority of jurisdictions. According to a compilation in the Winter 1969 issue of the North Dakota Law Review (the entire issue is devoted to a symposium on the juvenile offender and the law), at page 258, only twelve jurisdictions provide some form of jury trial for juveniles.[7] Twenty-seven other jurisdictions deny juveniles a jury trial.[8]

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[7] Alaska Stat. §47.10.070 (Supp. 1966); Colo. Rev. Stat. Ann. §37-8-2 (1964); D.C. Code Encyclopedia §16-2307 (1961); Kan. Gen. Stat. Ann. §38-808 (Supp. 1967); Mich. Comp. Laws Ann. ch. 712A. 17 (1968); Mont. Rev. Codes Ann. §10-603 (1947); Okla. Stat. Ann. tit. 10, §1110 (Supp. 1968); S.D. Code §43.0331 (1939); Tex. Rev. Civ. Stat. Ann. art. 2338-1, §13 (b) (Vernon Supp. 1968); W. Va. Code Ann. §4904 (53) (1961); Wis. Stat. Ann. §48.25(2) (1957); Wyo. Stat. Ann. §14-108(c) (1961).

[8] 18 U.S.C. §5063 (1964), found partially unconstitutional in *Nieves* v. *United States*, 280 F. Supp. 994 (S.D.N.Y. 1968); Ala.

Bloom v. *State of Illinois*, 391 U.S. 194, teaches that substance rather than form dictates the availability of jury trial. The Court noted its reluctance to overturn the firmly entrenched constitutional principle that serious contempts were not triable to a jury,[9] but said that neither the historical support for the principle, "nor the considerations of necessity and efficiency normally offered in defense of the established rule, justify denying a jury trial in serious criminal contempt cases."[10]

The Court's treatment of criminal contempt in *Bloom* decisively answers the argument that a judgment of incarceration in a state institution for juveniles results from a civil proceeding. We think the following statement of the Court applies just as precisely to juvenile delinquency proceedings leading to confinement in a state institution as to contempt:

Code, tit. 13, §369 (1969); Ariz. Rev. Stat. Ann. §8-229 (1956); Ark. Stat. Ann. §45-206 (1964); Del. Code Ann. tit. 10, §1175 (Supp. 1966); Fla. Stat. Ann. §39.09(2) (1961); Ga. Code Ann. §24-2420 (1959); Hawaii Rev. Laws §333-19 (1 Session Laws of Hawaii act 232 (1965)); Idaho Code Ann. §16-1813 (Supp. 1967); Ind. Stat. Ann. §9-3215 (Supp. 1968); Iowa Code Ann. §232.27 (Supp. 1968); Ky. Rev. Stat. §208.060 (1962); La. Rev. Stat. Ann. §13:1579 (West 1968); Minn. Stat. Ann. §260.155 (Supp. 1967); Miss. Code Ann. §7185.08 (1942); Neb. Rev. Stat. §43-206.03 (Supp. 1965); Nev. Rev. Stat. §62.190(3) (1963); N.J. Stat. Ann. §2A:4-35 (1963); N.M. Stat. Ann. §13-8-49 (Supp. 1967); jury provision found unconstitutional in *Peyton* v. *Nord*, 437 P.2d 716 (N.M. 1968), at least where criminal laws require trial by jury; N.Y. Crim. Proc. Law §913-h (McKinney 1958); N.D. Cent. Code §27-16-18 (Supp. 1967); Ohio Rev. Code Ann. §2151.35 (1964); Ore. Rev. Stat. §419.498 (Supp. 1967); Pa. Stat. Ann. tit. 11, §247 (1954); Utah Code Ann. §55-10-94 (Supp. 1967); Vt. Stat. Ann., tit. 33, §651(a) (Supp. 1968); Wash. Rev. Code Ann. §13.04.030 (1962).

[9] 391 U.S. 197, 198.

[10] 391 U.S. 198.

"Criminal contempt is a crime in the ordinary sense; it is a violation of the law, a public wrong which is punishable by fine or imprisonment or both. In the words of Mr. Justice Holmes:

> 'These contempts are infractions of the law, visited with punishment as such. If such acts are not criminal, we are in error as to the most fundamental characteristic of crimes as that word has been understood in English speech.' Gompers v. United States, 233 U.S. 604, 610, 34 S.Ct. 693, 695, 58 L.Ed. 1115 (1914).

Criminally contemptuous conduct may violate other provisions of the criminal law; but even when this is not the case convictions for criminal contempt are indistinguishable from ordinary criminal convictions, for their impact on the individual defendant is the same. Indeed, the role of criminal contempt and that of many ordinary criminal laws seem identical—protection of the institutions of our government and enforcement of their mandates.

Given that criminal contempt is a crime in every fundamental respect, the question is whether it is a crime to which the jury trial provisions of the Constitution apply. We hold that it is, primarily because in terms of those considerations which make the right to jury trial fundamental in criminal cases, there is no substantial difference between serious contempts and other serious crimes. * * * "[11]

This court has already made clear in *Application of Gault,* 387 U.S. 1, 27, that a juvenile delinquency proceeding leading to incarceration is a criminal case:

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[11] 391 U.S. 201, 202.

"Ultimately, however, we confront the reality of that portion of the Juvenile Court process with which we deal in this case. A boy is charged with misconduct. The boy is committed to an institution where he may be restrained of liberty for years. It is of no constitutional consequence—and of limited practical meaning—that the institution to which he is committed is called an Industrial School. The fact of the matter is that, however euphemistic the title, a 'receiving home' or an 'industrial school' for juveniles is an institution of confinement in which the child is incarcerated for a greater or lesser time. * * *

* * * * *

In view of this, it would be extraordinary if our Constitution did not require the procedural regularity and the exercise of care implied in the phrase 'due process.' Under our Constitution, the condition of being a boy does not justify a kangaroo court. The traditional ideas of Juvenile Court procedure, indeed, contemplated that time would be available and care would be used to establish precisely what the juvenile did and why he did it—was it a prank of adolescence or a brutal act threatening serious consequences to himself or society unless corrected? Under traditional notions, one would assume that in a case like that of Gerald Gault, where the juvenile appears to have a home, a working mother and father, and an older brother, the Juvenile Judge would have made a careful inquiry and judgment as to the possibility that the boy could be disciplined and dealt with at home, despite his previous transgressions. Indeed, so far as appears in the record before us, except for some conversation with Gerald about his school work and

his 'wanting to go to * * * Grand Canyon with his father,' the points to which the judge directed his attention were little different from those that would be involved in determining any charge of violation of a penal statute. *The essential difference between Gerald's case and a normal criminal case is that safeguards available to adults were discarded in Gerald's case.* * * *" (Emphasis supplied.)

This Court has also answered in *Bloom, supra,* the argument that expeditiousness and ephemeral considerations, such as the juvenile's feelings about the process he is being subjected to, excuse denying him the fundamental procedural right of trial by jury. As succinctly put by the Court at 391 U.S. 208:

"We cannot say that the need to further respect for judges and courts is entitled to more consideration than the interest of the individual not to be subjected to serious criminal punishment without the benefit of all the procedural protections worked out carefully over the years and deemed fundamental to our system of justice. Genuine respect, which alone can lend true dignity to our judicial establishment, will be engendered, not by the fear of unlimited authority, but by the firm administration of the law through those institutionalized procedures which have been worked out over the centuries.

We place little credence in the notion that the independence of the judiciary hangs on the power to try contempts summarily and are not persuaded that the additional time and expense possibly involved in submitting serious contempts to juries will seriously

handicap the effective functioning of the courts. We do not deny that serious punishment must sometimes be imposed for contempt, but we reject the contention that such punishment must be imposed without the right to jury trial. The goals of dispatch, economy, and efficiency are important, but they are amply served by preserving the power to commit for civil contempt and by recognizing that many contempts are not serious crimes but petty offenses not within the jury trial provisions of the Constitution. When a serious contempt is at issue, considerations of efficiency must give way to the more fundamental interest of ensuring the even-handed exercise of judicial power."

Though rarely articulated, lurking just beneath the surface of all arguments that juveniles must not have juries, is the fear that, in some cases, a jury might acquit a juvenile and thus spare him from the benevolent rehabilitative techniques of the state. The decision in *Bloom* also succinctly disposes of this argument, 391 U.S. 209:

"* * * In isolated instances recalcitrant or irrational juries may acquit rather than apply the law to the case before them. Our system has wrestled with this problem for hundreds of years, however, and important safeguards have been devised to minimize miscarriages of justice through the malfunctioning of the jury system. Perhaps to some extent we sacrifice efficiency, expedition, and economy, but the choice in favor of jury trial has been made, and retained, in the Constitution. We see no sound reason in logic or policy not to apply it in the area of criminal contempt."

The New York Court of Appeals in *People* v. *Fuller*, 5 CrL 2097, decided April 10, 1969, held that the Fourteenth Amendment equal protection clause requires a jury trial in the addiction commitment of persons convicted of narcotics offenses. The court, speaking through Keating, J.:

> "The issue in both proceedings is identical. Convicted addicts committed to the control of the Commission are in theory subjected to the same intensive rehabilitation program and are to be released when cured, whether or not the length of deprivation of freedom is proportional to the gravity of the act for which they were committed (See Mental Hygiene Law, Section 204)."
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> * * * * *
>
> "The fruitlessness of an argument based on a simplistic view that we are not involved here with a guilt-finding mechanism is readily apparent when it is recalled that the most important consequence of a finding of guilty is not only the stigma of conviction but, more importantly, the incarceration which normally attends the finding. * * * It is the substance, not the form that will control. * * *"
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> * * * * *
>
> "One final argument made is that requiring jury trials will impose a tremendous burden on the courts. Something more than this is required. * * *"

We have not extended this brief with citations to, or quotes from, the massive array of literature on this subject. This Court's decisions in *Gault, Duncan,* and *Bloom*

have so completely mooted the arguments, pro and con, that no further explication is necessary.

Duncan's imposition on the states of the right to jury trial in cases where the potential punishment exceeds six months incarceration certainly indicates that DeBacker, committed until his twenty-first birthday pursuant to Section 43-210.02 R.R.S. 1943 a term that could exceed three years, is entitled to trial by jury.

II.

Statute Providing for Proof by Preponderance in Delinquency Proceeding, Based on Misconduct Which Would Be Felony if Charged Criminally, Violates Fourteenth Amendment.

Nebraska has long recognized the American tradition that "guilt in a criminal cause must be proved beyond a reasonable doubt." [12] In 1892, the Nebraska Supreme Court said in *Binkley* v. *State*, 34 Neb. 757, 52 N.W. 708 that:

> " • • • Guilt is not to be established by mere conjecture or suspicion, however strong. All experience has shown that a party may be wholly innocent of the offense of which he is accused, although appearances may be against him. The law, therefore, to guard against injustice requires, that the offense be established by evidence beyond a reasonable doubt. It is a serious matter, not only to a party, but to the state as well, to take a person from the ordinary avocations of life, brand him as a felon and deprive him of his liberty, appropriate his labor and cast a cloud upon

[12] *Brinegar* v. *United States*, 338 U.S. 160, 173, 174-175 (1949).

his future life and humiliate his relatives and friends; and to authorize the state in doing this there should be no reasonable doubt of his guilt."

Since DeBacker's case is a criminal case, in any realistic sense of the term, the state denies him due process and the equal protection of the laws when it incarcerates him on a civil standard of proof. The basic standard of proof in a civil action in Nebraska is "a preponderance of the evidence therein."[13] However, where a plaintiff seeks to overcome the presumption arising from the express term of a deed by parole evidence, much more certainty and conclusiveness are required than in ordinary cases,[14] and when a litigant seeks to overcome by parole evidence a presumption arising from express terms of conveyance and relations of parties concerned therein, the quality of evidence must be clear, satisfactory and convincing.[15]

Four judges of the Nebraska Supreme Court would strike down as unconstitutional Section 43-206.03, R.S. 1943, incorporating a preponderance of the evidence standard for delinquency proceedings, relying on *In re Urbasek*, 38 Ill. 2d 535, 232 N.E. 2d 716 and *United States* v. *Costanzo*, 395 F. 2d 441 (4th Cir.) (A. 31).

The highest courts of our two most populous states have grappled with the standard of proof in delinquency proceedings since this case was decided by the Nebraska Supreme Court. The Supreme Court of California, in *In re M.*, 75 Cal. Rptr. 1, 450 P.2d 296, decided February 20,

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[13] *Search* v. *Miller*, 9 Neb. 26, 1 N.W. 975 (1879).

[14] *Doane* v. *Dunham*, 64 Neb. 135, 89 N.W. 640 (1902).

[15] *Hein* v. *W. T. Rawleigh Co.*, 167 Neb. 176, 92 N.W. 2d 185 (1958).

1969, held that a statute declaring that a preponderance of evidence, legally admissible in the trial of criminal cases, must be adduced to support adjudication of delinquency, is not clearly and positively unconstitutional, Peters, J., dissenting. The Court of Appeals of New York, in a four to three decision *In the Matter of Samuel W.*, No. 616, —— N.Y. 2d ——, decided March 6, 1969, held that the reasonable doubt standard was not required in juvenile cases. Since *Gault*, we have appellate decisions in Illinois;[16] Texas;[17] New York (*In re Samuel W., supra*); California (*In re M., supra*); Nebraska (this case), United States Court of Appeals for the Fourth Circuit[18] and the District of Columbia.[19] Greater judicial division could scarcely exist on a problem. Illinois, Texas, the Court of Appeals for the Fourth Circuit and four of the seven judges on the Nebraska Supreme Court would apply the reasonable doubt standard and a majority of the judges of the courts of California, New York, and the District of Columbia would apply the civil standard. The decisions for the civil standards, however, continue to rely on the premise that juvenile delinquency proceedings are civil.

The California Supreme Court assumed, *In re M.*, 450 P.2d 296, 301, that the reasonable doubt standard "is part of the due process of law guaranteed in criminal cases by the Fourteenth Amendment referring to *Speiser* v. *Randall* (1958), 357 U.S. 513, 525-526. The court, however, still clung to the traditional approach to juvenile court fact-

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[16] *In re Urbasek*, 38 Ill. 2d 535, 232 N.E. 2d 716 (1967).

[17] *Santana* v. *State* (Tex. Civ. App. 1968), 431 S.W. 2d 558.

[18] *United States* v. *Costanzo*, 395 F.2d 441, 445.

[19] *In re Wylie* (D.C. Mun. App. 1967), 231 A. 2d 81, 84.

finding making the following remarkable statement at 450 P.2d 303:

> " * * * thus a determination whether or not the person committed the particular misdeed charged—although the very heart of an adult criminal prosecution—may not in fact be critical to the proper disposition of many juvenile cases. On the contrary, in the latter the best interests of the youth may well be served by a prompt factual decision at a level short of 'moral certainty.' "

How the best interests of a youth may be served by incarcerating him on the basis of a "prompt factual decision at a level short of moral certainty" escapes us. We also believe that a determination of whether or not a juvenile is to be rehabilitated, particularly when such rehabilitation may well involve incarceration for several years (just as rehabilitation of an adult sometimes requires incarceration for a like term) is the "very heart" of a juvenile proceeding and, if a juvenile wishes to contest the supposed need for his rehabilitation, what rational basis is there for denying him the same procedural rules available to an adult who wishes to contest his incarceration?

The California court lists the present lineup of commentators pro and con at 450 P.2d 305, and noted, at 450 P.2d 304, that "the National Conference of Commissioners on Uniform State Laws adopted the Illinois position (*In re Urbasek* (1967), *supra*, 38 Ill. 2d 535, 232 N.E. 2d 716) in requiring proof beyond a reasonable doubt in delinquency cases, but remain satisfied with the clear and convincing evidence standard in determining neglect or need of treatment. (Uniform Juvenile Court Act) (Final draft, August 1968, §29.)"

We think the commissioners' proposed standards are correct. The determination of neglect or need of treatment, where the volitional act of a juvenile of the age of criminal responsibility is not involved, is not a criminal matter and should not be treated as such.

Justice Peters dissented at 450 P.2d 309, pointing out:

> "* * * certainly the right to a jury trial and the right to insist that guilt be shown beyond a reasonable doubt are fundamental and constitutional rights in a criminal case. This the majority concede. But the majority contend that the determination that the minor shall be a ward of the court is not criminal in nature. The majority spend 33 pages of lengthy discussion that does no more than confuse the issue. It urges that in juvenile proceedings these rights are not fundamental. Certainly to the minor the proceedings are adversary and criminal in nature. The determination that the minor shall be a ward of the court may result in the confinement of the minor during minority and complete restriction on his freedom of action. Realistically, a proceeding that may result in such confinement and restraint is adversary in nature and criminal in effect. To hold that such a proceeding is not adversary in nature and criminal in effect is to close one's eyes to the realities of the situation and, as well, is contrary to the teachings of Gault."

The Court of Appeals of New York, *In the Matter of Samuel W.*, #616, —— N.Y. 2d ——, March 6, 1969, insisted that a juvenile proceeding is not criminal saying that, even if a juvenile is incarcerated, the statute provides that his adjudication is not a "conviction" and affects no

right or privilege (slip opinion page 4). The fallacy of this approach is apparent if one stops to consider whether removing the usual civil disabilities from felony convictions and denominating them "adjudications" would be a constitutional excuse for doing away with the adversary system of criminal justice as we know it today. This argument demonstrates again the problems of those who would restrict juveniles to second class justice. They must continually find and attach labels to obscure the realities of the situation, yet we have not read a convincing argument that the unique benefits of the juvenile court system require constitutionally diluted fact-finding procedures. No one has pointed out why all of the supposed benefits of the juvenile court—the kindly judge—placements made by friendly social workers—confidentiality of records and proceedings —and state assurance that no adverse consequences will flow from the adjudication, are not readily available and capable of implementation after adjudication made by jury on a standard of proof beyond reasonable doubt. Proponents of the present system seem to argue that a juvenile should not get something for nothing and that if all these benefits are to be showered upon him, whether he likes it or not, he should be willing to give up some of his most basic constitutional rights.

Fuld, Chief Justice, dissented, joined by Burke and Keating, JJ. We think we can make no better argument than Chief Justice Fuld and we adopt it as follows:

> Once the Supreme Court decided that the child was entitled, as a matter of due process, to notice of charges, to counsel, to the rights of confrontation and examination and the privilege against self incrimination—because the proceeding is 'comparable in seriousness to a

felony prosecution' (387 U.S., at p. 36) and because the 'safeguards available to adults' in 'a normal criminal case * * * [may not be] discarded in [a child's] case' (p. 29)—it necessarily follows that a finding of guilt, the prerequisite in this case for imprisonment until the boy's eighteenth year, may not be predicated upon less than proof beyond a reasonable doubt.

There may not be any decision expressly stating that the reasonable doubt standard is an essential aspect of due process in criminal prosecutions. But who could question that it is? That standard has been so deeply imbedded in our law, is so fundamental and universal, that no one would venture in an ordinary criminal case to apply a standard less stringent. It is essential to due process not only because of the deprivation of liberty which could result but also because of the vital part it plays in the entire criminal procedural scheme. For example, the burden of proof is closely related to the privilege against self incrimination—as a device to offset the adverse effect of a defendant's failure to defend himself. It also compensates for lack of discovery proceedings and disclosure devices traditionally available to ordinary civil litigants. Manifestly, a person accused of a crime, whether he be an adult defendant in a criminal case, or a child charged as a delinquent, would be at a severe disadvantage, a disadvantage amounting to a lack of fundamental fairness, if he could be adjudged guilty and imprisoned for years on the strength of the same evidence as would suffice in a civil case.

My conclusion is not without support in judicial decision. At least two courts have also concluded that, in the light of *Gault* (387 U.S. 1, *supra*), due process demands that the proof in a delinquency proceeding be

beyond a reasonable doubt. (See *In re Urbasek,* 38 Ill 2d 535; *United States* v. *Costanzo,* 395 F 2d 441; see, also, Dorsen and Rezneck, Gault and Juvenile Law, 1 ABA Family Law Quart., No. 4 [Dec. 1967] pp. 25-27. But see, contra, *In re Wylie,* 231 A 2d 81; *Debacker* v. *Brainard,* 183 Neb. 461, probable jurisdiction noted Feb. 24, 1969, 37 U.S.L.W. ——.) Thus, in the *Costanzo* case (395 F 2d 441, *supra*), the Federal Court of Appeals for the Fourth Circuit declared (pp. 444-445):

"Our precise question then is whether for purposes of the required quantum of evidence, no less than for notice, counsel, cross-examination, and the privilege against self-incrimination, a federal juvenile proceeding which may lead to institutional commitment must be regarded as 'criminal.' We hold that it must be so regarded. No verbal manipulation or use of a benign label can convert a four-year commitment following conviction into a civil proceeding. [Case cited.] *The government's burden in a juvenile case, therefore, is to prove all elements of the offense 'beyond a reasonable doubt,' just as in a prosecution against an adult.* * * * In practical importance to a person charged with crime the insistence upon a high degree of proof ranks as high as any other protection [p. 444].

* * * * *

"* * * It would appear a patent violation of due process and equal protection of the law if a juvenile were found to have committed a crime on less evidence than would be required in the case of an adult, especially since the consequences of the adjudications are essentially the same" [p. 445]. (Emphasis supplied.)

And in the *Urbasek* case (38 Ill 2d 535, *supra*), the high court of Illinois, noting that the language of the opinion in *Gault* 'exhibits a spirit that transcends the specific issues there involved' (p. 541), wrote that (pp. 540-541)

> "it would seem that the reasons which caused the Supreme Court to import the constitutional requirements of an adversary criminal trial into delinquency hearings logically require that *a finding of delinquency for misconduct, which would be criminal if charged against an adult, is valid only when the acts of delinquency are proved beyond a reasonable doubt to have been committed by the juvenile charged* [p. 540].
>
> "* * * When we eschew legal fictions and adopt a realistic view of the consequences that attach to a determination of delinquency and a commitment to a juvenile detention home, 'juvenile quarters' in a jail or a State institution * * * we can neither truthfully nor fairly say that such an institution is devoid of penal characteristics. * * * the incarcerated juveniles' liberty of action is restrained just as effectively as that of the adult inmates serving terms in State and Federal Prisons" [p. 541]. (Emphasis supplied.)

It may well be, as the court observes (Opinion, p. 6), that there is but a 'tenuous difference' between 'a fair preponderance of the evidence' and 'proof beyond a reasonable doubt.' But the simple fact is that the Family Court judge in the case before us saw a difference between those standards. In reaching his decision that the appellant was guilty, he explicitly acknowledged that he was basing his findings of fact on the 'preponderance of evidence' and frankly admitted that the proof fell short of establishing guilt or delinquency beyond a

reasonable doubt. Along with Dorsen and Rezneck (Gault and Juvenile Law, 1 ABA Family Law Quart., No. 4 [Dec. 1967] p. 27), I too find it difficult to understand 'how the distinctive objectives of the juvenile court give rise to legitimate institutional interest in finding a juvenile to have committed a violation of criminal law on less evidence than if he were an adult.'

It has been aptly said that the prosecution's duty to establish guilt beyond a reasonable doubt 'is a requirement and a safeguard of due process of law in the historic, procedural content of "due process."' (*Leland* v. *Oregon,* 343 U.S. 790, 802-803, *per* Frankfurter, J., dissenting.) With the *Gault* case on the books, it follows, I suggest, that where a 12-year-old child is charged with an act of stealing which renders him liable to confinement for as long as six years, then, as a matter of due process, as well as of equal protection, the case against him must be proved beyond a reasonable doubt.

III.

The Critically Important Decision of Whether a Juvenile Is to Be Handled in Criminal Court or Juvenile Court Cannot Be Left to the Discretion of a State Officer Outside the Judicial System.

Section 43-205.04, R.R.S. 1943, provides that a minor under the age of eighteen years who is detained under the provisions of the Act, shall be released within forty-eight hours after having been taken into custody, excluding non-judical days, unless within that time (1) a petition has been filed alleging that such minor has violated an order of the juvenile court, (2) a petition has been filed pursuant to the

act, or (3) a criminal complaint has been filed. The Nebraska Juvenile Court Act does not require that juveniles accused of crime be proceeded against under it. As noted by Judge McCown, speaking for four judges in this case:

> "Some of the juvenile court acts made the jurisdiction of the juvenile court exclusive, and some provided for a waiver by the juvenile court to the adult criminal court. The Nebraska pattern created a concurrent jurisdiction as to criminal misconduct, and enabled the county attorney to determine whether to file an action under the general criminal laws of the state, or a delinquency proceeding in the juvenile court. See, State v. McCoy, 145 Neb. 750, 18 N.W. 2d 101; Fugate v. Ronin, 167 Neb. 70, 91 N.W. 2d 240" (A. 25).

A state doubtless is under no more obligation to provide a juvenile court system than it is appellate review. *Cf. Griffin* v. *Illinois,* 351 U.S. 12, 18. But if if does so, it cannot make the advantages and disadvantages applicable on the basis of the prosecutor's whim. In *Lane* v. *Brown,* 372 U.S. 477, the Court refused to sanction a procedure where the refusal of a public defender to take an appeal prevented an indigent prisoner from having a transcript, saying at 372 U.S. 485:

> "* * * The provision before us confers upon a state officer outside the judicial system power to take from an indigent all hope of any appeal at all. Such a procedure, based on indigence alone, does not meet constitutional standards."

It is submitted that a procedure permitting a prosecutor to choose a criminal or juvenile court forum is likewise constitutionally defective. During the oral argument of this

case in the Nebraska Supreme Court, Judge Newton observed that, if appellant's challenge was sustained, prosecutors might elect to prosecute more often in criminal court since their burden would be the same. If this Court sustains appellant's challenge, and places upon the prosecutor basically the same burdens he faces in criminal court, then the danger might be real and a juvenile should not be deprived of the supposed dispositional advantages, including the disabilities flowing from a felony conviction, because of the prosecutor's whim. On the other hand, if the Court decides that a juvenile is to continue to be seriously procedurally disadvantaged in juvenile court, as the price he must pay for its supposed dispositional advantages, then a juvenile ought to be allowed to insist on the procedural advantages of the criminal court if he and his counsel decide that such a course would be in his best interests. If a juvenile wishes to contest the criminal misconduct alleged against him, he is surely entitled to the same weapons as his adult counterpart.

As Mr. Justice Frankfurter observed: "Law addresses itself to actualities."[20] The actualities here are that all states have juvenile court systems and, while this Court in *Kent* v. *United States*, 383 U.S. 541, was dealing with waiver as a part of a statutory scheme, it seems to us the Court at least implied that due process has a role, quite apart from statutory language, to play in the determination of the court in which a juvenile delinquent is to be handled. We find this implication in the following language at 383 U.S. 554:

> "We do not consider whether, on the merits, Kent should have been transferred; but there is no place in our

[20] *Griffin* v. *Illinois*, 351 U.S. 12, 23, concurring.

> system of law for reaching a result of such tremendous consequences without ceremony—without hearing, without effective assistance of counsel, without a statement of reasons. It is inconceivable that a court of justice dealing with adults, with respect to a similar issue, would proceed in this manner. It would be extraordinary if society's special concern for children, as reflected in the District of Columbia's Juvenile Court Act permitted this procedure. We hold that it does not."

Nebraska has a similar statutorily declared societal concern for children. Section 43-218, R.R.S. 1943, declares:

> "This act shall be liberally construed to the end that its purpose may be carried out, namely, that the care, custody and discipline of a dependent, neglected or delinquent child shall approximate, as nearly as may be, that which should be given by its parents, and in all cases where it can be properly done, the child shall be placed in an approved family home and become a member of the family by legal adoption or otherwise."

In holding that Kent was entitled to a hearing on the question of waiver, including access by his counsel to the social records and to a statement of reasons for the juvenile court's decision, this Court believed the results to be "required by the statute read in the context of constitutional principles relating to due process and the assistance of counsel." 383 U.S. 557.

It was held in *Nieves* v. *United States*, D.C.S.D., N.Y., 280 F.Supp. 994, by a three-judge court, that:

> "to the extent it deems consent to FJDA proceedings a waiver of jury trial and requires that these proceed-

ings be held without jury, 18 U.S.C. §5033 (1964) impairs a juvenile's free exercise of his Sixth Amendment right and is therefore invalid."

The court went on to say that since the government had decided to permit Nieves to proceed under the FJDA, he was entitled to choose to do so or elect criminal prosecution, being entitled to a trial by jury in either event. 280 F.Supp. 1006. We think that *Nieves* stands for the proposition that an accused juvenile has a right to choose his forum without incurring procedural disadvantages. We are aware that the FJDA authorizes the Attorney General, in his discretion to direct criminal proceedings against a juvenile,[21] and that this is similar to the Nebraska procedure with the exception that the local United States Attorney cannot make the choice, as can the local Nebraska prosecutor. This federal procedure is probably not as objectionable as the Nebraska procedure since the decision is made by an official far removed from whatever influence local passion might bring to bear, but we think it is also constitutionally infirm because, as we have pointed out, no prosecutor should be able to make a decision of such "tremendous consequences" in his sole discretion.

Texas has recently amended its juvenile court act to provide waiver standards consonant with due process for the juvenile and the state's interest in prosecuting the seriously criminal delinquent.[22] The Texas statute provides for a hearing with appointed counsel who has access to the records, a diagnostic study and full evaluation with emphasis placed on the retention of juvenile jurisdiction unless the

[21] 18 U.S.C. §5032.

[22] Vernon's Annotated Rev. Civ. Statutes, Art. 2338-1 §6.

seriousness of the events in the background of the offender considered with the welfare of the community indicates otherwise. Statutory guidelines are set forth providing that weight is to be given to whether the offense was against person or property, offenses against property being considered less serious, and whether the offense was aggressive or premeditated. The juvenile judge is admonished statutorily to consider the sophistication and maturity of the child together with his record and prior history along with his prospects of rehabilitation with the juvenile court facilities available, balanced against society's need for protection. The Texas statute appears to be patterned after the policy memorandum of the Juvenile Court of the District of Columbia set forth as an appendix to *Kent* v. *United States* at 383 U.S. 565.

We think juvenile courts have become too much a part of our tradition to permit their availability to rest on the arbitrary decision of a prosecutor.

Conclusion

The desirable functions of the juvenile court system will in no way be impaired by this Court's insistence that the liberty of a child is as precious as that of an adult. When the final result of a delinquency proceeding can be the transfer of a child from an industrial school to an adult penal institution for a term not to exceed two years,[23] the actualities of the situation require the imposition of all safeguards traditionally accorded those accused of crime.

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[23] Section 83-455 R.R.S. 1943.

Judge Spencer, of the Nebraska Supreme Court, put the issues in this case in their proper perspective when he said:

> "With a background of several years' experience in juvenile matters, I can appreciate the position of the many conscientious experts on juvenile problems who believe that it is to the best interests of the child that a public trial, with all its connotes, be avoided, and that the case of the juvenile be processed as informally as possible. Yet, I am persuaded that it is my duty to keep ever in mind that a child, as well as an adult, is entitled to all constitutional protections and that his rights cannot be determined by the criterion of what I may feel is best for him. The decision on a question of a waiver of his constitutional rights is a decision that must be made for him by his legal representative" (A. 43-44).

The decision of the Supreme Court of Nebraska should be reversed with directions to enter judgment declaring the Nebraska Juvenile Court Act unconstitutional insofar as it denies a juvenile a jury trial, permits him to be adjudicated a delinquent on the basis of a preponderance of the evidence and vests the prosecutor with the sole power to determine the forum in which the juvenile will be proceeded against.

Respectfully submitted,

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APPENDIX

APPENDIX A

Sixth Amendment to the Constitution of the United States

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the Constitution of the United States

"Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Reissue Revised Statutes of Nebraska 1943:

83-455. Penal and Correctional Complex; inmates; transfer to from Boys' Training School; incorrigibility. The Department of Public Institutions, with the approval of the Board of Pardons, may transfer any person sixteen years of age, or over, from the Boys' Training School because of

incorrigibility to the Nebraska Penal and Correctional Complex for custody and care for a term not to exceed two years.

28-601. Forgery, defined; penalty. . . . (2) whoever shall utter or publish as true and genuine or cause to be uttered or published as true and genuine or shall have in his possession with intent to utter and publish as true and genuine, any of the above-named false, forged, counterfeited, falsely printed or photographed matter, above specified and described, knowing the same to be false, altered, forged, counterfeited, falsely printed or photographed, with intent to prejudice, damage or defraud any person or persons, body politic or corporate, shall be imprisoned in the Nebraska Penal and Correctional Complex for any space of time not exceeding twenty years nor less than one year, and pay a fine not exceeding five hundred dollars.

43-201. Juvenile courts; definition of terms. As used in sections 43-201 to 43-220, unless the context otherwise requires:

(1) This act shall be construed as referring exclusively to sections 43-201 to 43-220;

(2) Dependent child shall mean any child under the age of eighteen years, who is homeless or destitute, or without proper support through no fault of his parent, guardian, or custodian;

(3) Neglected child shall mean any child under the age of eighteen years (a) who is abandoned by his parent, guardian, or custodian;

43-205. Juvenile court; proceedings; by whom and how instituted; title of proceedings. The county attorney or any reputable person residing in the county, with the consent of the county attorney, having knowledge of a child

in his county who appears to be neglected, dependent, delinquent, or a child in need of special supervision, may file with the clerk of the court having jurisdiction in the matter, a petition in writing, setting forth the facts verified by affidavit. It shall be sufficient if the affidavit is upon information and belief. Such petition and all subsequent proceedings shall be entitled In the Interest of , a Child Under Eighteen Years of Age, inserting the child's name in the blank.

43-205.01. Juvenile courts; child taken into custody without warrant; age limit; grounds; not deemed an arrest. A child under the age of eighteen years may be taken into custody by any officer of the peace without a warrant or order of court (1) when in the presence of the officer the child has violated a state law or municipal ordinance; (2) when a felony has been committed and he has reasonable grounds to believe such child committed it; (3) when such child is seriously endangered in his surroundings, and immediate removal appears to be necessary for his protection; or (4) when there are reasonable grounds to believe that he has run away from his parent, guardian or custodian. Such taking into custody shall not be deemed an arrest.

43-205.02. Juvenile courts; temporary custody of minor; steps to be taken; alternatives permitted. An officer who takes a minor into temporary custody under the provisions of section 43-205.01, shall immediately take reasonable measures to notify the minor's parent, guardian, custodian, or relative and shall thereafter proceed as follows:

(1) He shall release such minor; or

(2) He shall prepare in duplicate a written notice requiring the minor child to appear before the juvenile court or probation officer of the county in which such minor was taken into custody at a time and place specified in the notice. The notice shall also contain a concise statement

of the reasons such minor was taken into custody. He shall deliver one copy of the notice to such minor and require such minor or his parent, guardian, custodian, or relative, or both, to sign a written promise that such signer will appear at the time and place designated in the notice. Upon the execution of the promise to appear, he shall immediately release such minor. He shall, as soon as practicable, file one copy of the notice with the juvenile court or officer appointed by the court for such purpose or the probation officer; or

(3) He shall take such minor without unnecessary delay before the juvenile court or probation officer of the county in which such person was taken into custody and deliver the custody of such minor to the juvenile court or probation officer.

In determining which disposition of the minor he will make, the officer shall prefer the alternative which least restricts the minor's freedom of movement, if such alternative is compatible with the best interests of the minor and the community.

43-205.03. Juvenile courts; temporary custody of minor; investigation by probation officer; release of child, when. Upon delivery to the juvenile court or probation officer of a minor who has been taken into temporary custody under the provisions of sections 43-205.01 to 43-205.05, the court or probation officer shall immediately investigate the circumstances of the minor and the facts surrounding his being taken into custody. The court may then either (1) immediately release such minor to the custody of his parent, guardian, or responsible relative, or (2) admit such minor to bail by bond in such amount and on such conditions and security as the court, in its sole and exclusive discretion, shall determine. In no case shall the court or probation officer release such a minor if it appears that further detention of such minor is a matter of immediate and urgent necessity for the protection of such minor or the person or

property of another or if it appears that such minor is likely to flee the jurisdiction of the court.

43-205.04. Juvenile courts; temporary custody of minors under the age eighteen; release required within forty-eight hours unless complaint or petition filed; exceptions; violation; penalty. Whenever a minor under the age of eighteen years is detained under the provisions of section 43-205.03, such minor shall be released within forty-eight hours after having been taken into custody, excluding non-judicial days, unless within such period of time (1) a petition has been filed alleging that such minor has violated an order of the juvenile court, (2) a petition has been filed pursuant to the provisions of section 43-205, or (3) a criminal complaint against him has been filed in a court of competent jurisdiction, and except when a criminal complaint is filed, an order continuing detention until the adjudication hearing, after a reasonable showing that the necessity for detention still exists, is entered by the juvenile court.

This section shall not apply to a minor who has escaped from a commitment, or to a child who has been taken into custody for his own protection pursuant to subdivision (3) of section 43-205.01, in which latter case the child shall be held for a reasonable time. Any person who knowingly holds a child in detention in violation of any of the provisions of this section shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined in any sum not exceeding one hundred dollars, or be imprisoned in the county jail for a period not to exceed thirty days.

43-205.05. Juvenile courts; temporary custody of minor; taken before juvenile judge promptly. Unless sooner released, a minor taken into custody under the provisions of sections 43-205.01 to 43-205.05 shall be brought before a judge of the juvenile court for an adjudication hearing as soon as possible after a petition has been filed. If the minor is not brought before a judge of the juvenile court

within a reasonable period of time, he shall be released from custody.

43-205.06. Juvenile court; minor under eighteen years; right to counsel; appointment. When any minor under eighteen years of age shall be brought without counsel before a juvenile court within the meaning of Chapter 43, article 2, the judge shall advise such minor and his parents or guardian of their right to retain counsel and shall inquire of such minor and his parent or guardian as to whether they desire to retain counsel. The judge shall inform such minor and his parent or guardian of their right to counsel at county expense if none of them is able to afford counsel. If the minor or his parent or guardian desire to have counsel appointed for such minor, or the parent or guardian of such minor cannot be located, and the judge ascertains that none of such persons are able to afford an attorney, the judge shall forthwith appoint an attorney to represent such minor for all proceedings before the judge in the juvenile court.

43-206. Juvenile court; issuance of process; summons; subpoena. (1) Upon the filing of the petition, a summons with a copy of the petition attached shall issue requiring the person who has custody of the child or with whom the child may be to appear personally and, unless the court orders otherwise, to bring the child before the court, at the time and place stated.

(2) If the petition alleges that the minor is a delinquent child or a child in need of special supervision, a summons, with a copy of the petition attached, shall also be served on said minor requiring him to appear personally at the time and place stated.

(3) If the person so summoned is other than a parent or guardian of the child, then the parent or guardian or both, if their residence is known, shall also be notified of the pendency of the case and of the time and place ap-

pointed; if there is neither a parent nor guardian, or if his or her residence is not known, then some relative, if there be one and his residence is known, shall be so notified; *Provided*, in any case the judge may appoint some suitable person guardian ad litem to act in behalf of the child.

(4) No summons or notice shall be required to be served on any person, except as required by subsection (2) of this section, who shall voluntarily appear before the court and whose appearance is noted on the records thereof.

(5) If it appears that the child is in such condition or surroundings that his welfare requires that his custody be immediately assumed by the court, the judge may, by endorsement upon the summons, order the officer serving it to take the child into custody at once.

(6) Subpoena may be issued requiring the appearance of any other person whose presence, in the opinion of the judge, is necessary.

43-206.01. Juvenile court; service of process; manner; time; by whom made. (1) Service of summons shall be made by the delivery of a copy thereof to the person summoned or by leaving one at his usual place of residence.

(2) Notice, when required, shall be given in the following manner:

(a) If the person to be notified resides in the county where the action is pending, by delivery of a copy thereof to the person to be notified or by leaving it at his usual place of residence;

(b) If the person to be notified resides outside or has left the county where the action is pending, by mailing a copy thereof by registered or certified mail to the last known address of such person; or

(c) If after reasonable inquiry, the whereabouts or an address of the parent, guardian or a relative cannot be

ascertained, the court may publish a notice in a newspaper of general circulation in the county in which the proceeding is pending. The published notice shall simply state that a proceeding concerning the child is pending in the court and that an order making an adjudication and disposition will be entered therein. If the names of one or both parents or the guardian are unknown, he or they may be notified as the parent or parents, or guardian of (naming or describing the child) found (stating address or place where the child was found). Such notice shall be published once each week for three weeks, the last publication of which shall be at least five days before the time of hearing.

(3) Personal or residence service shall be effected at least twenty-four hours before the time set for the hearing. Registered or certified mail shall be mailed at least five days before the time of the hearing.

(4) Service of summons, notice or subpoena may be made by any suitable person under the direction of the court.

43-206.02. Juvenile court; failure to appear; warrant; custody of child pending adjudication. If the person summoned or subpoenaed as provided in sections 43-206 to 43-206.04, shall without reasonable cause fail to appear and abide the order of the court or bring the child, he may be proceeded against as in the case of contempt of court. In case the summons cannot be served or the parties served fail to obey the same, and in any case when it shall be made to appear to the court that such summons would be ineffectual, a warrant may issue on the order of the court, either against the parent or guardian or the person having custody of a child, or with whom the child may be, or against the child itself. On the return of the summons or other process, or as soon thereafter as legally may be, the court shall proceed to hear and dispose of the case as provided in section 43-206.03; *Provided*, that the hearing shall not be had until there is before the court the minor

when charged under subdivisions (4) and (5) of section 43-201, and in all cases the minor's custodian or person with whom he may be, parent or guardian, or, if they fail to appear, a guardian ad litem.

Pending the adjudication of any case, the child may be retained a reasonable period of time on order of the court in the possession of either the person having the charge of the same or some other suitable person, or may be kept in some suitable place provided by the city or county authorities or given to any proper and accredited charitable institution; *Provided*, the court may order such child examined by a physician, surgeon, psychiatrist or psychologist.

43-206.03. Juvenile court; hearings; adjudication; effect. (1) The hearing as to a child in custody of the probation officer or the court shall be held as soon as possible after the petition is filed, and as to a child not in such custody as soon as practicable after the petition is filed.

(2) Hearings shall be conducted by the judge without a jury in an informal manner, applying the customary rules of evidence in use in civil trials without a jury in the district courts.

(3) At the hearing the court shall first consider only the question of whether the minor is a person described by section 43-201. This shall be known as the adjudication. After hearing the evidence on said question, the court shall make a finding and adjudication entered in the minutes based on the preponderance of the evidence, whether or not the minor is a person described by section 43-201.

(4) If the court shall find that the child named in the petition is not within the provisions of section 43-201 it shall dismiss the case. If the court finds that the child named in the petition is such a child, it shall make and enter its finding and adjudication accordingly, designating which subdivision or subdivisions of section 43-201 said

child is within; the court shall then proceed to an inquiry into the proper disposition to be made of the child.

(5) No adjudication by the juvenile court upon the status of a child shall be deemed a conviction nor shall the adjudication operate to impose any of the civil disabilities ordinarily resulting from conviction. The adjudication and the evidence given in the court shall not operate to disqualify the child in any future civil or military service application or appointment.

43-206.04. Juvenile court; files; how kept; certain reports and records not open to inspection without order of court. (1) The juvenile court judge shall keep a minute book in which he shall enter minutes of all proceedings of the court in each case, including appearances, findings, orders, decrees and judgments, and any evidence which he feels it is necessary and proper to record. Juvenile court legal records shall be deposited in files and shall include the petition, summons, notice, certificates or receipts of mailing, minutes of the court, findings, orders, decrees, judgments and motions.

(2) The medical, psychological, psychiatric and social welfare reports and the records of juvenile probation officers as relate to individual proceedings in the juvenile court shall not be open to inspection, without order of the court.

43-210. Delinquent children; adjudication; alternatives given to court for disposition of case. When any child is adjudicated to be a delinquent child, the court may:

(1) Continue the dispositional portion of the hearing, from time to time upon such terms and conditions as the court may prescribe, including an order of restitution of any property stolen or damaged when the same is in the interest of the child's reformation or rehabilitation and, subject to the further order of the court, may:

(a) Place the child under the supervision of a probation officer;

(b) Permit said child to remain in its own home, subject to the supervision of the probation officer; or

(c) Cause the child to be placed in a suitable family home or institution, subject to the friendly supervision of the probation officer; *Provided*, that under subdivision (1) (a), (1) (b), or (1) (c) of this section upon a determination by the court that there are no private or other public funds available for the care, custody and maintenance of a child, the court may order a reasonable sum for the care, custody and maintenance of the child to be paid out of a fund which shall be appropriated annually by the county where the petition is filed until a suitable provision may be made for the child without such payment; or

(2) The court may commit such child to the care and custody of the Department of Public Institutions.

43-210.01. Child in need of special supervision; orders permitted; commitment to Department of Public Institutions, when. When any child is found by the court to be a child in need of special supervision as defined by subdivision (5) of section 43-201, the court may enter such order as it is empowered to enter in the case of a delinquent child except that no such child shall be committed to the Department of Public Institutions until the court shall find:

(1) That said child has failed to make a satisfactory adjustment after a reasonable period of time under its original order; or

(2) Such commitment is necessary in the first instance for the protection of the health and welfare of said child or of society.

43-210.02. Juvenile court; commitment of children subject to act; hospital treatment; custody in state institu-

tions; discharge. The court may, when the health or condition of any child within the terms of this act shall require it, cause the child to be placed in a public hospital or institution for treatment or special care, or in an accredited and suitable private hospital or institution which will receive it for like purposes. If the court finds any such child to be feeble-minded as defined by section 83-219, it may, upon attaching the physician's certificate and the report as to the mental capacity provided by section 83-221, commit said child directly to the Beatrice State Home.

In no case shall a child committed under the terms of sections 43-201 and 43-202, sections 43-204 to 43-220, and sections 43-210.01 to 43-210.03 be confined after he or she shall have reached the age of twenty-one years. The marriage of any child committed to a state institution under the age of twenty-one years shall not make such child of the age of majority. A child committed to any such institution shall be subject to the control of the superintendent thereof, and the said superintendent, with the advice and consent of the Department of Public Welfare or the Department of Public Institutions, whichever has supervision of the institution, shall adopt by-laws for the promotion, paroling and final discharge of inmates such as shall be considered mutually beneficial for the institution and the inmates; *Provided*, upon final discharge of any inmate such department shall file a certified copy of the discharge with the court which committed said inmate.

43-212. Children under fourteen charged with crime; custody; detention; prohibitions; children under sixteen; detention; prohibitions. When a child under fourteen years of age is taken into custody the court or magistrate may place such child in the care of the sheriff, police officer or probation officer or other suitable person as the court or magistrate shall direct, who shall keep such child in some suitable place outside of the enclosure of any jail or police station. When any child under the age of sixteen years shall be detained in any institution to which adults

are sentenced, it shall be unlawful to permit such child to have verbal, visual, or physical contact with such adults at any time.

43-213. Neglected, dependent or delinquent children; confinement; parole; Director of Public Institutions; duties; Parole and Group Home Unit; created. It shall be the duty of the Director of Public Institutions to maintain an agent of the Department of Public Institutions, whose duty it shall be to examine the homes of children paroled from institutions under its jurisdiction, for the purpose of ascertaining and reporting to the department whether they are suitable homes, to assist children paroled or discharged from such institutions or placed in foster or group homes in finding suitable employment, and to maintain a friendly supervision over paroled inmates during the continuance of their paroles. To administer the provisions of sections 43-213, 83-108.04, 83-465 and 83-487, the Director of Public Institutions shall appoint a supervisor of the Parole and Group Home Unit, which is hereby created, and such other parole officers as are necessary to carry out the purposes of sections 43-213, 83-108.04, 83-465 and 83-487.

43-218. Act, how construed. This act shall be liberally construed to the end that its purpose may be carried out, namely, that the care, custody and discipline of a dependent, neglegected or delinquent child shall approximate, as nearly as may be, that which should be given by its parents, and in all vases where it can be properly done, the child shall be placed in an approved family home and become a member of the family by legal adoption or otherwise.